



November 29, 1999

Mr. Leonard Peck, Jr.
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR99-3402

Dear Mr. Peck:

You have asked whether certain information is subject to required public disclosure under the Public Information Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 128467.

The Texas Department of Criminal Justice (the "TDCJ") received an open records request for "all records, documents, x-rays, films, photographs, investigative reports and/or other written materials or tangible items which record, outline, address or contain information," concerning a specified deceased individual. In response to the request, you submit to this office for review the records at issue. Although you state that "[o]ther documents are being made available separately," you assert that the submitted information is excepted from disclosure under sections 552.101, 552.103 and 552.108 of the Government Code. We have considered the exceptions and arguments you have raised and reviewed the submitted information.

Because section 552.103(a) of the Government Code is the most inclusive exception you raise, we will consider this exception first. Section 552.103(a), the "litigation exception" excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under section 552.103(a). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the department must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989).

Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); see Open Records Decision No. 518 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. See Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

In this instance, you have supplied to this office a claim letter from an attorney who represents a potential opposing party. You state that the requestor's letter is a notice of claim.¹ The notice of claim involves a potential claim against the department on behalf of the requestor's client, concerning the death of the client's husband while in TDCJ custody. According to the requestor, the deceased person's wife asserts that TDCJ committed violations of her husband's "constitutional right to due process, as well as violations of the ADA (Americans with Disabilities Act)." Based on your arguments and the submitted records, we conclude that litigation is reasonably anticipated. We also conclude that the documents submitted by the department are related to the litigation for the purposes of

¹ Under Open Records Decision No. 638 (1996), a governmental body may establish that litigation is reasonably anticipated by showing that (1) it has received a claim letter from an allegedly injured party or his attorney, and (2) the governmental body states that the letter complies with the notice of claim provisions of the Texas Tort Claims Act ("TTCA") or applicable municipal statute or ordinance.

section 552.103(a). Therefore, the information at issue may be withheld pursuant to section 552.103(a).

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).²

We further note that the submitted information includes references to an autopsy report and a Custodial Death Report.³ The public disclosure of an autopsy report created by a medical examiner is governed by section 11 of article 49.25 of the Code of Criminal Procedure.⁴ Pursuant to section 11, to the extent the requested information includes autopsy records, such information is a public record and must be released to the requestor.⁵ *See also* Open Records Decision No. 529 at 8 (1989). Likewise, we note that in Open Records Decision No. 521

²We note that some of the information in the submitted documents is also confidential by law. Therefore, once litigation has concluded, should there be a subsequent request for this information, we advise the department to exercise caution and seek a ruling from this office concerning the records. *See* Gov't Code § 552.352, 552.101, 552.117.

³The Public Information Act's exceptions do not, as a general rule, apply to information made public by other statutes. Open Records Decision No. 525 (1989).

⁴Section 11 has been amended to provide that

[t]he records [of an autopsy] are subject to required public disclosure in accordance with Chapter 552, Government Code, except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with Chapter 552, Government Code, but is subject to disclosure:

- (1) under a subpoena or authority of other law; or
- (2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Act of May 22, 1999, 76 Leg., R.S., ch. 607, § 2, 1999 Tex. Sess. Law Serv. 3147, 3148 (Vernon) (to be codified as an amendment to CODE CRIM. PROC. art. 49.25, §11). This amendment took effect on September 1, 1999. *Id.* § 3.

⁵The submitted documents do not appear to include photographs or x-rays taken during the autopsy. *See* CODE CRIM. PROC. art. 49.25, §11(2).

(1989), this office held that under article 49.18(b), in conjunction with a directive issued by the Office of the Attorney General, section one of custodial death reports filed with this office is public information.⁶ All remaining portions of the custodial death report, *i.e.* Parts II through V, including all attachments, are deemed privileged under article 49.18(b) and must be withheld from the public. Open Records Decision No. 521 at 5 (1989). Accordingly, the department must withhold all portions of Parts II through V of the custodial death report. However, Part I of the custodial death report is expressly made public under article 49.18(b), and therefore this portion of the custodial death report must be released.

Finally, we note that some of the remaining information is subject to access provisions outside of the Public Information Act. *See* Open Records Decision No. 598 at 1 (1991) (Public Information Act exceptions are not applicable to medical records). Although you state that “[o]ther documents are being made available separately, *e.g.*, medical records relating to Mr. Tatum,” we note that the submitted records also contain some information which appears to consist of medical records. Access to the submitted medical records is governed by the Medical Practice Act (the “MPA”), article 4495b of Vernon’s Texas Civil Statutes. Sections 5.08(b) and (c) of the MPA provide:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient’s behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

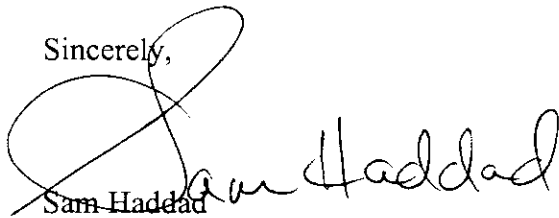
Section 5.08(j)(1) provides for release of medical records upon the patient’s written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be

⁶Article 49.18(b) of the Code of Criminal Procedure requires that law enforcement agencies complete custodial death reports and file those reports with the attorney general, who “shall make the report, with the exception of any portion of the report that the attorney general determines is privileged, available to any interested party.”

released. These medical records are confidential, with access provided only as outlined under the MPA.⁷ Open Records Decision No. 598 (1991).

As we resolve your request under section 552.103, we need not address your other claimed exceptions at this time. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink, appearing to read "Sam Haddad". The signature is written in a cursive style with a large, looping initial "S".

Sam Haddad
Assistant Attorney General
Open Records Division

SH/nc

Ref.: ID# 128467

encl: Submitted documents

cc: Mr. Tommy Gillaspie
Mallia & Jacobs
440 Louisiana, Suite 1100
Houston, Texas 77002
(w/o enclosures)

⁷We note that the requestor submitted to TDCJ signed "Medical Authorization" forms, which set out the information covered by the release, and the persons to whom the information is to be released. *See* Gov't Code § 552.229 (consent to release of information).